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Supreme Court of the United States

OCTOBER TERM, 1902.

No. 457.

DAVID R. JULIAN, SHERIFF; MRS. CLEMYE JAMES, ADMINISTRATRIX OF W. A. JAMES, AND MRS. FANNIE HOWARD, ADMINISTRATRIX OF JOHN H. A. HOWARD, PETITIONERS,

vs.

THE CENTRAL TRUST COMPANY, OF NEW YORK, AND SOUTHERN RAILWAY COMPANY, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI.

BRIEF OF CHARLES PRICE, SOLICITOR FOR RESPONDENTS, OPPOSING GRANTING WRIT OF CERTIORARI.

We submit, this is a case, in which, the writ of certiorari, should not issue; and, in support of this contention, it is to be observed, that, on the 5th of October, 1901, the Sheriff of Rowan County, North Carolina, David R. Julian, was enjoined, from seizing the Western North Carolina Railroad, over 250 miles, in length, and delivering the same, after

sale, *immediately*, to the purchaser, under section 674, of the Code of North Carolina, in satisfaction of two judgments, one, in the sum of $15,000; and, another, $5,000, recovered, as set out in the bill, printed in the record, page 53.

The injunction was issued upon the bill, supplemental, to the original bill, to foreclose a mortgage, executed to the Central Trust Company, of New York, printed in the record, page 90.

As we say, this is a supplemental bill, or may be treated as an original bill, to remove a cloud from the title, cast upon property, bought by Southern Railway Company, at foreclosure sale, by decree of Circuit Court. Page 53, Record.

It is also a bill, to protect Southern Railway Company, in enjoyment of property, bought, under decree of foreclosure, and sale.

As to the jurisdiction, see *Root* vs. *Woolworth*, 150 U. S. R., page 401.

"The bill, being ancillary to the original proceeding" * * * "and supplementary to the decree rendered therein, can be maintained, without reference to the citizenship, or residence of the parties." Page 413, 150 U. S. R., *Ibid.*

It is only in equity, that adequate relief can be had, in this proceeding; because, 1st, irreparable damage would be done, unless the officer was restrained from "*seizure of the property*" as he is *required* by the Code of North Carolina, to do. See section 674, of the Code of North Carolina. This section provides, that the officer shall, "*immediately* after such sale, deliver to the purchaser possession *of all the corporate real property connected with the franchise*," &c. See notice of sale, printed in the bill, where respondent says, he will "sell agreeably to law," this property. See printed bill, p. 53.

Equity jurisdiction, also, is invoked in this case, to prevent a multiplicity of suits. There are other judgments

against this old company, similar to those of James and Howard, and others. And, also, other actions, pending in this district against the Western North Carolina Railroad Company. See transcripts. *Wehrman* vs. *Conklin*, 155 U. S. R., 314. Pages 17, &c., of Record. In *Central Trust Company, of New York*, vs. *W. N. C. R. R. Co.*, 89 Fed. Reporter, page 24, Judge Simonton shows, the jurisdiction of the court, and, that section 720 of Revised Statutes is not involved.

On page 124 of the printed record, as a part of the decree of confirmation of sale, is the following: "It is further ordered and decreed," that the Special Master make a deed to Southern Railway Company, conveying this "*railroad* and *property, franchise*, etc.," "*free from any and all equity of redemption, of the said Western N. C. R. R. Co., or, any one, claiming, by, under, or through it*," except the prior mortgage, recited in the decree. This makes the Southern Railway Co. "*the absolute owner thereof.*" The owner of what? "*All and singular the railroad, equipment, property, and franchises, so, as aforesaid, sold* under the decree of this court." It is a sale and transfer of the *railroad and franchise;* not the *estate* of the Western N. C. R. R. Co., alone, but "the *property* and *franchises*," themselves.

In the last paragraph of the same, there is a *further assurance*, proviso.

So that two years, before James and Howard were killed, under these decrees, deed &c., the Southern Railway Co., was the "*absolute owner*" [illegible] property, and franchises.

The W. N. C. R. R. Co., had no possible interest or estate, in the *railroad*, or *franchises*, so sold.

There is no lien law in North Carolina, that gave Mrs. James, and Mrs. Howard, a lien upon a thing, the defendant, the W. N. C. R. R. Co., *did not have, at the time of the origin of their claims, the deaths of deceased.*

Then we see, they are cut off, because the decree, on page 55, says: *free from all and every equity of redemption* of the

said W. N. C. R. R. Co., "*or any one claiming by, under, or through, it.*"

These people certainly claim "*by, under, and through,* The W. N. C. R. R. Co.," *because their judgments were obtained on account of something done, by the Western N. C. R. R. Co., as alleged, more than two years after the sale, under foreclosure.*"

Then, this is as much foreclosed, as the rights of stockholders. "The judgment of foreclosure is conclusive, against the stockholders," *and against anything, that the W. N. C. R. R. Co. could do, or, any right claimed, by any one, on account of anything, done by the W. N. C. R. R. Co. after sale.* See Judge Simonton's opinion, page 29 Fed. Rep., Vol. 89.

See *deed of master,* as to *what was conveyed under these decrees, &c.*

In addition to authorities cited by Judge Simonton, see *Farmers' Loan & Trust Co.* vs. *Lake St. R. R. Co.*, page 51, 177 U. S. R., and, especially, pages 61 and 62. *Hancock National Bank* vs. *Foreman*, page 641, 176 U. S. Rep.

It is well settled, that, for a sheriff to make, an "*excessive levy*" is actionable, by a defendant, in the execution. Sec. 773, Mecham on Public Officers. "*It cannot be tolerated,*" says, Cooley, Justice, "*that such a seizure shall go unrebuked.*" *Handy* vs. *Clifford*, 50 Mich., 355.

Here was *five millions of property levied on, and notice of purpose to seize* "*the entire property, corporate real,*" and deliver to the purchaser *immediately* after sale. See page 4, of bill. Also, section, in bill, *infra.*

A court of equity, is the only court, that *can* give adequate relief, in a case of this kind.

In this argument, we beg the Court to note the most *important fact,* that the Southern Railway Company, a Virginia corporation, *purchased* the Western North Carolina Railroad, and *franchises of the corporation,* and all of its other property, at a foreclosure sale, under a second mortgage, subject to a lien of the first mortgage, the Central Trust

Company of New York, being trustee, in *both* mortgages. This purchase was in fee.

This sale was duly confirmed, on the 22nd day of August, 1894. See full decree, on page 123, of the record. See deed, of Master, page 154, of record.

Under this decree, and by virtue of the deed, of the Master, it is to be observed, the Southern Railway Company, became the absolute owner of the property, and franchises, of the corporation, sold; and, was in *sole possession* of the railroad, and franchises of the old company, and had been operating *the road for over two years, as sole owners, before the disaster*, out of which, resulted the death of James, the intestate of the respondent James, Admx.; and, of Howard, also.

The Western North Carolina Railroad Company, the old corporation, *at that time, had no interest, no estate of any kind or character*, in the franchise; or, any other property of that old corporation, which had been sold, and purchased, by the Southern Railway Company.

In the action brought by the Admx. in the superior court of Rowan county, the State court, that is to say, the James case, the Southern Railway Company, was not a party. The action was tried with James, Admx., as sole plaintiff, and the Western North Carolina Railroad Company, *sole* defendant, same as to Howard.

The contention on the part of the plaintiff, was, that the railroad was being operated by a lessee, under a valid lease, made by authority of law, and, that the lessee, that is to say, the Western North Carolina Railroad Company, was liable to plaintiff for the death of intestate, an engineer, the same caused by the negligence of the lessee, which lessee was in sole possession of, and solely operating, the railroad.

The contention of the defendant, that is to say, the Western North Carolina Railroad Company, was, that the old corporation was dissolved, for all purposes, but one, and that one was, its existence for three years, in which to wind up its affairs, the time fixed by statute. In addition to this, it was

contended that the death of the intestate was caused by the negligence of a fellow-servant, to wit: the engineer in charge of the locomotive coming in collision, with the one driven by plaintiff's intestate. The trial court, the Superior Court, held that the old corporation was dissolved by the sale and conveyance made by the master, as provided in sec. 697, of the Code of North Carolina, and gave judgment for the defendant. From this judgment, the plaintiff appealed to the Supreme Court, which court overruled the court below, and directed that judgment be entered against the defendant, for the amount of the verdict, which was in favor of the plaintiff, upon the question of negligence.

The sole question, presented by the record, to the Supreme Court, upon appeal, was whether the corporation was dissolved. The Court held it was not, and affirmed the judgment.

Sec. 697 provided, that, upon a sale of a corporation's property, like this, under foreclosure, or trust, the purchaser, *ipso facto*, by the sale, and conveyance, became a corporation.

It is, as follows:

"SEC. 697. If a sale be made under a deed of trust or mortgage executed by any corporation on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the corporation as they were at the time of making the deed of trust or mortgage, but any works which the corporation may after that time, and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale other than debts due to it. Upon such conveyance to the purchaser, the said corporation shall *ipso facto* be dissolved, and the said purchaser shall forthwith be a new corporation by any name which may be set forth in the said conveyance, or in any writing signed by him and recorded, in the same manner in which the conveyance be recorded."

This is a familiar statute, and was never construed, elsewhere, as in North Carolina.

There must be some one, to take the place of the old corporation.

It is admitted, the Southern Railway Company, purchased the equity of redemption, at the foreclosure sale. Having done this, what, may we ask, estate, had the Western North Carolina Railroad Company, in the property, franchises, &c.?

The only estate of the old corporation, in the same, that is to say, in the *railroad*, and *franchises of the Company, was an equity of redemption*, which was sold, and bought by the Southern Railway Company.

Then, at the time of the killing of James and Howard, admittedly, employés of the Southern Railway Company, the Western North Carolina Railroad Company, *had no property, of any kind, or character.* Nor, indeed, *had the Company, had, for more than two years.*

James and Howard, were *not employed*, by the Western North Carolina Railroad Company, and *never had been.* They were servants of the Southern Railway Co., and employed, by that Company, to operate one of its engines, being driven, on the railroad, purchased, under the decree of foreclosure, and sale, entered in the Circuit Court of the United States, in May, 1894.

Section 697 of the Code, was enacted, for the purpose of supplying a corporation, to take the place of the one, whose property was sold, which sale was supposed to have dissolved the old Company.

There must be some one, to whom the State can look, for performance of the duties imposed by the sovereign, as a consideration for granting the franchise.

This is true, and, as the lord paramount, under the feudal system, looked to the freeholder for the performance of the feudal services, so does the sovereign, now look, to the holder of the franchise, for the performance of the duties imposed, when it was granted. It looks, we may say, to the franchise itself, and in doing so, this performance is, by the person

owning the franchise, as in this case, the Southern Railway Company.

This is a North Carolina franchise, owned by a person, of another State. The Southern Railway Company is a corporation, operating a railroad, under and by reason of the franchise, purchased, at the sale of the Western North Carolina R. R., under the decree of foreclosure and sale, passed by the circuit court of the United States, as disclosed by the record, in this suit.

The Southern Railway Company operates the *North Carolina Railroad*, the property of *another* company, in North Carolina, but only by reason of the *ownership of the franchise of that company, for a term of years.* But for this, it could not operate it; and, but for *its ownership absolute, of the franchise of the old W. N. C. R. Co.*, it could not operate *it.* When the sovereign power grants a railroad charter, or, we may say, *any* charter, it does two things: It brings a person, a corporation, into existence; and then confers upon it, certain rights privileges, sometimes, called liberties, but, always, franchises. With the permission of the sovereign, the corporation may dispose of its franchises, as it may, of any of its other property. But it cannot dispose of *itself.* So when the Western North Carolina Railroad Company, executed the 1st and 2nd mortgages, the 2nd, being a mortgage of its *equity of redemption*, and all the property, including its franchises, and there having been a foreclosure and sale, under that 2nd mortgage, so far as *property was concerned*, the corporation had none left. In the face of this, it is contended, that, in satisfaction of a judgment, obtained in the State court, three years after the corporation had *lost all its property*, including its franchises, upon *an alleged cause of action*, which did not *arise until two years after the purchase of this property* and franchise, the *same property and franchises*, can be taken, by a process, issuing from the State court.

Justice Matthews, on page 619, Vol. 112, U. S. Reports, in the case of *Memphis R. R. Co.* vs. *Commissioners*, says:

"The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises."

Cook on Corporations, pages 1798 and 2130. See cited cases by this author on same pages. Pages numbered at bottom.

In the petition, and brief, some importance is attached to the fact, that A. B. Andrews, verified the answer, in the actions for negligence, prosecuted in the State court. This was on account of section 667, of the Code of North Carolina, which gave to the old Company, three (3) years' time, to wind up the business of the dissolved corporation. A. B. Andrews was the president of the Company, before foreclosure sale.

At this point, we may further observe, that the petitioners insist, the Southern Railway Company, a Virginia corporation, could not purchase the franchise of the Western North Carolina Railroad Company, at the foreclosure sale, without express permission of the sovereign.

It is not denied, that the Western North Carolina Railroad Company had the right, the power, to mortgage its property, *including its franchise.* Under the laws of North Carolina, and its charter, the corporation was empowered

to place as many mortages, upon the same, as it saw fit. This being so, it is "obvious that legislative authority to mortgage the franchises of a corporation, carries with it an implied authority to make the mortgage *effective by bringing those franchises to a sale, and transferring them*, with the *tangible* property of the corporation, to the purchaser." 35 Amer. State Reports, page 398, note 2, citing *New Orleans, &c., R. R. Co.* vs. *Delamore*, 114 U. S., 501.

This being so, who could purchase? Any person could, not prohibited from doing so, by some law. Indeed, if any person or corporation in North Carolina could purchase, so could any person or corporation, of another State. It is not denied that the Southern Railway Company is capable of holding this property under a *lease*. The Supreme Court of North Carolina, in the *Logan Case*, 116 N. C., has so decided. This is so by reason of the power conferred upon the lessor corporation, to lease its property. It would not be a valid lease, however, unless the lessee was authorized to take the property under the lease. Out of what does this authority grow, or come? First, because the Virginia charter conferred upon the lessee the power to take; and, second, because of the laws of comity between the States. There is nothing in the laws of North Carolina which forbids, the purchase of the property, by a Virginia corporation. The Southern Railway Company had the power to take under the lease. It has the power to purchase. A corporation created by one State can transact business in another State, by consent of the latter. That consent may be either express or implied. When implied, it is under the laws of comity. In this case, there being nothing to forbid the carrying on the business of the foreign corporation, in the laws of North Carolina, its consent is implied. The business of the foreign corporation, is that expressed in its charter; amongst other things and powers enumerated, in the same, is the one of authority to purchase, and operate, railroads in other States. Under this power, so conferred, by the State, creating the

Southern Railway corporation, and by reason of this consent, so implied, by the State of North Carolina, even in the absence of any provision, in its laws, concerning the same, it has the power to purchase, and under that power, regardless, as we say, of the express power granted by the sections of the Code, cited, in the opinion of the Circuit Judge, did purchase, the franchise and other property, of the old corporation, as we have before shown.

Lafayette Ins. Co. vs. *French*, 18 How., 400, 407.

Any citizen, any *individual*, had the right to purchase this property, at the foreclosure sale, whether a resident of this, or any other State.

New Orleans, &c., vs. *Delamore*, Vol. 114, page 508, U. S. Reports.

Memphis Railroad Co. vs. Commissioners, 112, U. S. Rep. 619.

Barcello vs. Hapgood, 118 N. Car. Rep., 728–729.

This is a matter, however, *only to be enquired into by the State. Ibid.*

Under the laws of North Carolina, a corporation can sell, transfer, or mortgage its franchises, except, *that*, to be, and exist, as a corporation. Code of N. Car., sections 671, 673, 675.

With regard to the purchase, the word, person, is used; and, corporation is a person, under the Fourteenth Amendment.

"In the case of *Gulf, Colorado and Santa Fe Ry. Co.* vs. *Ellis*, 165 U. S. R., page 150, Mr. Justice Brewer, says: 'It is well settled that corporations are persons within the provisions of the fourteenth amendment of the Constitution of the United States. *Santa Clara County* vs. *So. Pac. R.*, 118 U. S., 394; *Pembina Mining Co.* vs. *Penn.*, 125 U. S., 181, 189; *Missouri Pac. R.* vs. *Mackey*, 127 U. S., 205; *Minn. & St. Louis Ry.* vs. *Herricks*, 127 U. S., 210; *Minn. & St. Louis Ry.* vs. *Beckwith*, 129 U. S., 26; *Charlotte & Columbia R. R.* vs.

Gibbes, 142 U. S., 386; *Covington & Lexington Turnpike Co.* vs. *Sandford*, 164 U. S., 578. The rights and securities guaranteed to persons, by that instrument, cannot be disregarded, in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations, the equal protection of the law, than it has to individual citizens.'"

The following is paragraph four, subsection (*a*) of the Charter of the Southern Railway Company, granted by the State of Virginia, on the 20th of February, 1894. Acts of Assembly of Virginia, 1893–'94, Chap. 302, p. 368:

4. In addition to its other powers, such new corporation, shall have, and from time to time, as occasion arises, may exercise, the following powers, or any of them, namely:

(*a*.) With the approval of a majority of its stockholders, given at a meeting, it may, from time to time, lease, use, operate, consolidate with, or purchase, or otherwise acquire, or be leased, used, operated by, or consolidated with, any railroad or transportation company, now or hereafter incorporated by the laws of the United States, or of any of the States, thereof, or any one or more of such railroad or transportation companies, or any other railroad or transportation company or companies, which now are, or hereafter may be, leased, or used, or operated by, or consolidated with, any one or more, of such railroad or transportation companies.

We call the attention of the Court to an able, and elaborate, discussion of this subject, including the jurisdiction, in a former opinion of Judge Simonton, in a case, similar to this, Central Trust Company *vs.* Western North Carolina Railroad Company, 89 Fed. Rep., 24, 25, &c.

To say that the State lost its right of visitation and enforcement of forfeiture, for misuser and non-user, by reason of the purchase of the franchise and property of the Western

North Carolina Railroad Corporation by the Southern Railway Company, is to fail to distinguish between the body corporate, and its property, a part of which, is its *franchise*. The sovereign exercises its right of visitation, and enforcement of forfeitures, upon the *franchise*, and upon the person, owning the franchise, whether that person be a corporation, or a natural person.

In this case, the Southern Railway Company, is the owner of the franchise, as it is of the railroad track, and cars, that run upon the track.

There can be no intelligent appreciation of the principles involved in this case, as long as, the well-defined distinction between the *franchise*, and the *corporation* is not observed.

"Laws allowing the purchasers at a foreclosure sale to form a new corporation, are not intended to prevent a sale or transfer to a corporation *already formed*, and *capable, under the laws of its creation*, of holding the corporate property and exercising the franchises, which pass to the purchaser by sale: *People* vs. *Brooklyn, &c., Ry. Co.*, 87 N. Y., 75."
35 American State Reports, page 400, note.

As to the effect of permission, under the laws of comity, given a foreign corporation to do business in another State than that of its creation, &c., see *Conn* vs. *Chicago B. & Q. R. Co.*, 48 Fed. Reporter, page 177.

It is said, the order of the Circuit Court, prohibits the *issuing of execution* upon the judgment, against the Western North Carolina Railroad Company.

We do not so understand the decree. What the decree does, is, *to enjoin any interference with the property and franchises* of the Western North Carolina Railroad Company, *purchased* by the complainant, the Southern Railway Company, at the foreclosure sale. The *issue of execution*, is not enjoined. It is the *abuse of process*, that is enjoined.

The actions prosecuted in the State court, by James, Admx., and Howard, Admx., against the Western North Carolina

Railroad Company, growing out of the same disaster, in November, 1896, more than two years after the conveyance, to the Southern Railway Company, of all the property of the Western North Carolina Railroad Company, including all franchises of the corporation, under the foreclosure suits, in the year, 1894, were based upon the alleged negligence of the Southern Railway Company, the said purchaser, as alleged, operating the road as lessee, or agent.

The defense set up by its president, it being within the three years, allowed to wind up its business, was, *first*, a denial of the negligence; second, that the engineer's negligence, causing the injury and death of James and Howard, was that of a fellow-servant, and third, the fact that the corporation sued, was dissolved, by Section 697 of the Code.

The only point presented, by the record, in the Supreme Court, however, was the fact, that the Western North Carolina Railroad Company was dissolved. The Judge on the Circuit, had so decided. In this, he was reversed. No evidence of any lease was offered; nor, at the trial, was it suggested that there was any fraud in the sale. It was conceded, that the foreclosure proceeding was regular. Now, here was a statute construed, section 697, set out in this brief, by the Court, two years after the Southern Railway Company had purchased the property, to mean, that, before the old corporation became dissolved, there must be a new corporation supplied to take the place of the old. While this statute expressly provides, that, the sale and conveyance, *ipso facto, dissolved* the corporation, and the *purchaser* became a *new corporation*, the Court held it was not.

In the first place, we contend, that when an already organized corporation becomes the purchaser, at such sale, it is not necessary to supply another. *People* vs. *Brooklyn, etc., Ry. Co., 87 New York; 75 35th American State Reports, 400, and note.*

In a case of this kind, the statute does not apply.

So, that, really, the decision in the 121 N. Car. Rep., can have no bearing upon this case.

It *is plain to be seen*, that the *real purpose*, in prosecuting these actions against the *old, dissolved* company, was, to *avoid a removal of the same to the United States Circuit Court.*

Indeed, after the actions were tried, other suits, by the same plaintiffs, for the *same cause of action*, were begun, and *stand now, for trial*, in the said Court. There was no pretense that the Southern Railway Company was, or, is, insolvent.

The case of Railroad *vs.* Burnett, 123d N. Car. R., cited in petitioner's brief, can have no bearing upon this case, for the reason, that when the corporation's property and franchises were sold out, under the foreclosure proceeding, and bought by the Southern Railway Company, it was two years and three months *before the disaster*, out of which the actions for the death of James and Howard arose. In the Burnett case, the purchaser took with notice of the *plaintiff's claim*, although it had not been reduced to judgment, whereas, in the case at bar, there *was no claim*, as there could not be a *judgment*, at the time of the foreclosure sale; because, these men, servants of the Southern Railway Company, were not *killed*, until two years after the sale, as we have said, several times, in this brief.

The abuse of this process, the executions, issued by the Superior Court of the County of Rowan, the State court, consisted, as set out, in the bills, of an attempt to *seize the property, conveyed*, the Western North Carolina Railroad, and the *franchises of the corporation*, sold to complainant, by, and under, the decrees of the Circuit Court; and, in the sole, and exclusive use and occupation of the Southern Railway Company, which had been solely operating the same, more than two years, *before* the alleged negligent killing of James and Howard, as its own property.

The seizure of this property, and sale of the same, by this sheriff, is in contempt, and defiance, of the decrees of the court, solemnly entered.

This action of the sheriff, in attempting to sell this prop-

erty, as set out in the bill, printed in the record, is in violation of the laws of comity, between the courts of sovereigns.

The well known rule is, that, " in cases of persons who, or, of property, which, may be subject to the jurisdiction of the courts, of the States, or, of the United States, *that* jurisdiction, which *first actually attaches*, either to the person, or property, *will retain control*. It cannot be divested, by process issued from the other jurisdiction."

Covell vs *Heyman*, 111 U. S. R., page 182. In this case, Matthews, Justice, said :

" The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with, perhaps, no higher sanction than the utility which comes from concord ; but between State courts, and those of the United States, it is something more. It is a principle of right and of law, and, therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent ; and although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane ; and when one takes into its jurisdiction a specific thing, that *res*, is as much withdrawn, from the judicial power of the other, as if it had been carried physically, into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues."

Nothing can be found in the decisions of the Supreme Court of the United States, different from what Justice Matthews has said, in this case. There are a great many cases, which support the rule contended for.

Section 720 of the Revised Statutes has no relation to this case. It is not the process that is enjoined, but its abuse ; the injunction, protects the property of respondent.

When the bill for foreclosure was filed, in April, 1894, (Record, page 90) in the Circuit Court of the United States the *suit was begun*, and the Court asserted its jurisdiction over this property. It was then, *after the issue of process*, that the *res* was taken into the possession of the Court, "with power to hear and determine all controversies, relating thereto," as said by Justice Shiras, in the case of Farmers' Loan & Trust Co. *vs.* Lake St. Rd., 177 U. S., 61.

It is "to prevent unseemly conflicts, between courts, whose jurisdiction embraces the same subjects and persons." *Ibid.*

In Rodgers *vs.* Pitt, 96 Fed. Rep., 668, will be found cited, many cases, in support of this principle.

We call the attention of the Court, to the opinion of Judge Boyd, in this suit, on the Circuit, 112 Fed. Rep., 471, printed, in the record: and, also, to that of Judge Simonton, affirming the decree, speaking, for Circuit Court of Appeals. 115 Fed. Rep., 956, also in the record.

In addition to the foregoing, we print below, the brief, containing the substance of our argument, before Circuit Court of Appeals, at the hearing of this suit, February Term, 1902, in Richmond.

BRIEF FOR APPELLEES.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT. IN EQUITY.

DAVID R. JULIAN, *Sheriff;* MRS. CLEMYE JAMES, and FANNIE E. HOWARD, *Appellants,*
versus
THE CENTRAL TRUST COMPANY OF NEW YORK and SOUTHERN RAILWAY COMPANY, *Appellees.*
No. 438.

Brief of Charles Price, Solicitor for Appellees.

In answer to the brief of defendant's counsel, filed in the above entitled cause, we submit the following:

There was a foreclosure suit, prosecuted in the Circuit Court of the United States, Western District of North Carolina, the purpose of which was to foreclose a second mortgage, executed by the Western North Carolina Railroad Company, to the Central Trust Company of New York, trustee, of the date of the 2nd of September, 1884.

There was a decree of foreclosure and sale, duly entered in said suit May 2nd, 1894, and filed in the office of the clerk, at Statesville, May 5th, 1894.

This decree of foreclosure and sale so entered and filed, as aforesaid, in May, 1894, provides, amongst other things, as follows:

"The purchaser or purchasers of this property herein decreed to be sold," the Western North Carolina Railroad and its franchises, "shall be invested with and shall hold, possess and enjoy the said mortgaged premises and property herein decreed to be sold, and all the rights, privileges and franchises appertaining thereto, as fully and completely as the Western North Carolina Railroad now holds and enjoys, or has heretofore held and enjoyed the same; and further, the said purchaser or purchasers," and in this case, the Southern Railway Company, "shall have and be entitled to hold the

said railroad and property discharged of and from the lien of the mortgage foreclosed, in this suit, and from the claims of the *parties to this suit or any of them*, except the first consolidated mortgage of September 1st, 1884." See record in former suit, page 43.

After this decree of sale the property, that is to say, the Western North Carolina Railroad and its franchises, were sold in pursuance of the same, when the Southern Railway Company, a corporation originally created, in the State of Virginia, and doing business in the State of North Carolina, duly authorized to do so, became the purchaser. On the 22nd day of August, 1894, as appears on page 53 of the record, in the former suit, there was a decree of confirmation of sale, duly entered in the circuit court of the United States, which provides, amongst other things, as follows:

"It is further ordered and decreed that the special master is hereby authorized and directed, on the request of said purchaser, to sign, seal, execute, acknowledge and deliver a proper deed of conveyance to the said Southern Railway Company, conveying to it all and singular the railroad, equipment, property and *franchises* so as aforesaid sold under the decree of this court, free from any and all equity of redemption of the said Western North Carolina Railroad Company, *or any one claiming by, under or through it, except the prior mortgages recited in such decree.* Upon the delivery of such conveyance by the special master the said *Southern Railway Company shall fully possess, and be invested with all of the estate, right, title and interest in, to and of such railroad, equipment, property and franchises so sold under the decree of this court as the absolute owner thereof, to have and hold the same to it and its successors and assigns forever.* In order to facilitate the recording thereof, four counterparts, of such deeds may be executed, acknowledged and delivered by the special master, all or any one or more of which may be recorded, and any one or more of such counterparts, when executed, acknowledged and delivered, shall severally or collectively be deemed to be an original, and for all intents and purposes constitute a single instrument.

"On August 31st, 1894, on exhibition of the deed executed

and delivered by the special master herein ordered, the defendant company is authorized, directed and required forthwith to deliver over to the said Southern Railway Company the possession of all and singular the railroad and property described in and conveyed by such deed.

"It is also further ordered that by way of further assurance and confirmation of title to such Southern Railway Company of the property so by it purchased under the decree of this court, the said the Western North Carolina Railroad Company, by its proper officers and under its corporate seal, and the Central Trust Company of New York, trustee, shall, upon request of said Southern Railway Company, sign, seal, execute, acknowledge and deliver to said Southern Railway Company all proper deeds of conveyance, transfer, release and further assurance of all the railroad, property and franchises so as aforesaid sold under the decree of this court and embraced in the deed of the special master, so as fully and completely to transfer to and invest in the said Southern Railway Company the full, legal and equitable title to all such railroad, property and franchises sold or intended to be sold under the decree of this court."

In pursuance of the decree, so as aforesaid, duly entered, there was a deed executed and delivered by the special master, to the purchaser, the Southern Railway Company, complainant, on the 22nd of August, 1894, conveying to the purchaser, the property, as follows:

"All and singular the railroad of the said Western North Carolina Railroad Company in the State of North Carolina, extending from Salisbury, in Rowan county, to and through Statesville, in Iredell county, to Asheville, on or near the French Broad river, in Buncombe county; thence along the French Broad river to Paint Rock, in Madison county, and also from said Asheville westward to the Tennessee river at or near the mouth of the Nantahala river, and thence westward to Murphy, in Cherokee county; and all real estate now owned or acquired for the purposes of said railroad, including all station, depot or other grounds held and used in connection therewith; and all rails, railway tracks, sidings, switches, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger and

other depots, station and freight houses, machine shops, buildings, fixtures, rolling stock, equipment, machinery, tools and implements whatsoever, now owned or acquired for the purposes or business of the said Western North Carolina Railroad Company in connection with the said railroad and all the franchises, rights, privileges, easements, income, earnings and profits of the said Western North Carolina Railroad Company, connected with, issuing from or relating to the said above described railroad.

"*The foregoing properties, real, personal, choses in action and franchises*, being embraced in the lien of the second mortgage of the Western North Carolina Railroad Company executed September 2, 1884, *and being sold in foreclosure of the same.*

"A more full and particular description of the property intended to be conveyed by this instrument being contained *in said decree of the 5th of May, 1894*, to which reference is hereby made, *together with all the corporate estate, equity of redemption, rights, privileges, immunities and franchises of said Western North Carolina Railroad Company*, and all the tolls, fares, freights, rents, income, issues and profits of the said railroad, and all interests and claims and demands of every nature and description, and all the reversion and reversions, remainder and remainders thereof, including all the said mortgaged premises and property in said decree directed to be sold, at any time owned or acquired by, and now in the possession of, said Western North Carolina Railroad Company."

The said deed was duly registered in the Register's office for Rowan county, on the 5th of November, 1894.

(For a full copy of said deed, see Record, page 154.)

The purchaser, the Southern Railway Company, under and by virtue of the said decrees of foreclosure and sale, and the deed so executed, and delivered, entered into and took possession of the railroad and property and franchise in August, 1894, and has been *in the possession of the same ever since, as sole, absolute and exclusive owner.*

This ownership, on the part of the Southern Railway Company, sole and absolute, is subject only to the lien of the first

mortgage, the trustee in that mortgage being the Central Trust Company of New York. The date of that mortgage is the 1st of September, 1884.

After the foreclosure and sale of the said property, the railroad and franchises, the Western North Carolina Railroad Company, corporation, *had no estate, no interest, in the railroad whatsoever, nor in the franchises*, whatsoever.

The foreclosure suit was, in all respects, in the due form, and orderly course of the court.

The decrees so entered, as aforesaid, of foreclosure and sale, and of confirmation of sale, in which the purchaser was adjudicated to be the sole owner of this property and franchises, adjudicated also that ownership to be free from all equity of redemption of the Western North Carolina Railroad Company, or any one claiming by, under, or through it, except the prior mortgage.

It is to be noted that the corporation and stockholders were bound by these decrees. So are all persons or parties claiming by, under or through the stockholders, as are all those claiming by, under or through the corporation.

Since August, 1894, no person, no corporation, no company has had any estate in this property and franchises sold as aforesaid, except the Southern Railway Company, a corporation created in the State of Virginia, and doing business in North Carolina.

Since August, 1894, this railway company has been in the undisputed, sole possession of the Western North Carolina Railroad as its owner, and has operated the same under and by virtue of its ownership, absolute and unqualified, of the franchises of the Western North Carolina Railroad Company, a corporation created under the laws of North Carolina, which franchises were purchased at the said foreclosure sale with the other property of the said corporation, all of which is evidenced by the deed referred to in this brief, and printed on pages 98, 99, &c., of the record in the former suit.

It is not denied that the Western North Carolina Railroad Company had, under its charter and statutes of the State, the power to mortgage its franchise and other property.

To render this power effective, is carried with it, the power of foreclosure and sale.

This is expressly decided in the case of *New Orleans, &c.*, vs. *Delamore*, 114 U. S. Reports, 501.

A mortgage, with no power to foreclose, *would be worthless and ineffective.*

This was the state of affairs in 1896, November, when James and Howard lost their lives, one an engineer, and the other a fireman, in the service of the Southern Railway Company. These men were killed on the line of this railroad two years and three months *after the foreclosure sale*, at a time when the Western North Carolina Railroad Company had no possible interest, no possible estate, in the Western North Carolina Railroad, and none in the franchises of the corporation, both of which had been sold and bought by the complainant in August, 1894.

These men, James and Howard, were not in the employment of the Western North Carolina Railroad Company; and never had been in its employment.

The power to employ servants had been sold, together with its other powers and franchises, and bought by the Southern Railway Company, more than two years before the deaths of these men. At that time the Western North Carolina Railroad Company had no power to do anything, but exist as a corporation. It had no power to operate a railroad; no power of eminent domain; no power to employ servants or officers. All of these powers had been mortgaged, had been foreclosed, had been sold, under decrees of the Circuit Court of the United States. They were all purchased by the Southern Railway Company. Two decrees of the Circuit Court in May and August, 1894, solemnly adjudicated, that these powers, franchises and railroad, real and

personal property, were the property of the Southern Railway Company.

These decrees, one of foreclosure, and the other, of confirmation of sale, were duly entered in the Circuit Court of the United States, *three years before any adjudication was had in any State court*, in the James and Howard cases, as they are styled. When these actions were begun in the State Court, the Superior Court of Rowan County, North Carolina, against the Western North Carolina Railroad Company, to recover damages from that company, for alleged negligence of the company operating the railroad, *these decrees had long since been entered*, in the Circuit Court.

As appears from the exhibits in the record, the rights of these parties to have satisfaction of their judgments obtained against the Western North Carolina Railroad Company, James and Howard, are based upon the charge of fraud in obtaining these decrees in the foreclosure proceedings. Pages 94, 95, 96, 97, &c., of the record in former suit.

It cannot be shown anywhere, *that the Southern Railway Company ever pretended to take possession of this property, and franchises under any lease.*

Its title to the same, rests upon decrees of the Circuit Court of the United States. That being so, it seems to us, that the liability of the lessor for the tort of its lessee, has nothing to do with this case.

It is true the lessor, in a case of the kind mentioned by the counsel for defendants, has been held in a number of cases liable for the negligence of the lessee in North Carolina; but these decisions are all contrary to those of the United States Courts, and, indeed, of all the other States. It is a matter of general law, and this court is not bound by such decisions, if they were involved in this case. *Baltimore & Ohio R. R. Co.* vs. *Baugh*, 149 U. S. Rep., 378. *Arrowsmith* vs. *Nashville, &c., R. Co.*, 57 Fed. Rep., 165. In this case all the cases are reviewed by Judge Linton.

It is contended, in the brief of counsel for defendants, that

the decree, and opinion of this court, in former case, is *res adjudicata*. That was a supplemental bill filed to restrain and enjoin the prosecution of the suit of Pearson and others, stockholders, with whom these same parties joined to set aside the decree of foreclosure and sale and confirmation of sale, on the ground of fraud.

It was decided, Judge Morris delivering the opinion, that the complainants *were entitled to the relief demanded in the bill;* and, to that extent, the decree of Judge Simonton, on the Circuit, was affirmed.

In the opinion of Judge Morris, there was a direction that the decree appealed from, be modified so as to embrace no more *than was prayed for in the bill, that is to say, that the further prosecution of that suit be enjoined.*

In the decree entered on the Circuit, in pursuance of the mandate, there were recited certain things not enjoined, one being, that Mrs. James and Mrs. Howard were not enjoined from bringing any other suit, as they might be advised. 98 Fed. Rep., 495.

The opinion of the court, however, was direct that any suit, based upon the supposed rights of the stockholders, be, and is, enjoined. This was because the stockholders were represented in the foreclosure suit. They had had their day in court.

It is the same, as to the defendant corporation, *The Company, The Western North Carolina Railroad Company,* had had its day in court. Of course, the company was estopped, also, and as the *stockholders* were, and *all persons claiming under them,* so was the *corporation, defendant,* and all *persons claiming under, by, or through it.*

How do these parties claim? Their claims, their judgments, originated, *in something the corporation is alleged to have done two years, and more, after the decree of the Circuit Court adjudicated the Southern Railway Company, to be the absolute owner of the railroad and franchises, sold under the foreclosure proceeding.*

So these parties do claim under and by reason of *the acts of the corporation*, and the purpose of the defendant, Julian, as disclosed in his advertisement of sale, is in defiance of the decree of the Circuit Court, affirmed by this court.

The executions under which the sheriff was acting were as follows:

"STATE OF NORTH CAROLINA,
"*Rowan County.*

"IN THE SUPERIOR COURT.

"To the Sheriff of Rowan County, Greeting:

"Whereas judgment was rendered on the 21st day of February, 1898, in the Superior Court of Rowan County in an action between Clemye James, admrx. of W. A. James, plaintiff, and The Western North Carolina Railroad Company, defendant, in favor of the said Clemye James, admrx. of W. A. James, against the said defendant, The Western North Carolina Railroad Company, for the sum of $15,000 and costs, as appears to us by the judgment roll filed in the office of the clerk of the said County of Rowan; and, whereas, the judgment was docketed in the said County of Rowan on the 21st day of February, 1898, and the sum of $15,000 is due thereon, with interest on the said $15,000 from the 3rd day of May, 1897, until paid, and the further sum of $161.65 for costs and disbursements expended in the said suit whereof the said defendant, The Western North Carolina Railroad Company, is liable.

"You are therefore commanded, as often before, to satisfy the said judgment out of the personal property of the said defendant within your county; or, if sufficient personal property cannot be found, then out of the real property of the defendant and out of the corporate property, real and personal, of the said defendant, including its corporate franchises, corporate rights, privileges, powers, immunities, and all of the appurtenances belonging, or in anywise connected with or appertaining to it as a body corporate, *as owned and held by it on the day when the said judgment was so docketed in the said county of Rowan, or at any time thereafter, in whose hands soever the same may be;* and have you this execution,

together with the money, before our said court at the courthouse in Salisbury on the 11th Monday after the first Monday in September, 1901, it being the 18th day of November, 1901, then and there to render the same to the said plaintiff.

"Witness W. G. Watson, clerk of our said court, at office in Salisbury, on the first Monday in September, 1901.

"Issued this the 3rd day of September, 1901.

"W. G. WATSON,
"*Clerk Superior Court.*"

"STATE OF NORTH CAROLINA,
"*Rowan County.*

IN THE SUPERIOR COURT.

"To the Sheriff of Rowan County, Greeting:

"Whereas, judgment was rendered on the 21st day of February, 1898, in the Superior Court of Rowan county in an action between Fannie E. Howard, Admx. of Jno. H. A. Howard, and the Western North Carolina Railroad Company, defendant, in favor of the said Fannie E. Howard, Admx. of Jno. H. A. Howard, against the said defendant, the Western North Carolina Railroad Company for the sum of $5,000 and costs, as appears to us by the judgment roll filed in the office of the clerk of the said county of Rowan; and, whereas, the judgment was docketed in the said county of Rowan on the 21st day of February, 1898, and the sum of $5,000 is due thereon, with interest on the said $5,000 from the 21st day of February, 1898, until paid and the further sum of $140.13 for costs and disbursements expended in the said suit whereof the said defendant, the Western North Carolina Railroad Company is liable:

"You are therefore commanded, as often before, to satisfy the said judgment out of the personal property of the said defendant within your county; or if sufficient personal property cannot be found, then out of the real property of the defendant and out of the corporate property, real and personal of the said defendant, including its corporate franchises, corporate rights, privileges, powers, immunities and all its appurtenances belonging or in anywise connected with or appertaining to it as a body corporate *as owned and held by it on the day when the said judgment was so docketed*

in the said county of Rowan, or at any time thereafter, in whose hands soever the same may be; and have you this execution, together with the money, before our said court at the court-house in Salisbury on the 11th Monday after the first Monday in September, 1901, it being the 18th day of November, 1901, then and there to render the same to the said plaintiff.

"Witness W. G. Watson, clerk of our said court at office in Salisbury, the first Monday in September, 1901.

"Issued this the 3rd day of September, 1901.

"W. G. WATSON,
"*Clerk Superior Court.*"

The foregoing executions were levied on the *corporate property and real estate of the said Western North Carolina Railroad*, including corporate rights, franchises, privileges, powers, immunities, &c., on the 3d of September, 1901.

The following is the notice of sale, published by the Sheriff:

"SALE OF THE WESTERN NORTH CAROLINA RAILROAD UNDER EXECUTION.

"By virtue of executions issuing from the Superior Court of Rowan county, North Carolina, one in favor of Clemye James, Admrx. of W. A. James, for $15,000.00, interest and costs, and the other in favor of Fannie E. Howard, Admx. of Jno. H. A. Howard, for $5,000.00, interest and costs, upon judgments duly docketed in the Superior Court of said county of Rowan, reference hereby being had to the said judgments for a fuller description thereof, and by virtue of the levy made thereunder, the undersigned, as Sheriff of Rowan county, State of North Carolina, *will sell agreeably to the laws of the State in this behalf provided*, at public auction to the highest bidder, at the court-house door in Salisbury, on Monday, the 7th day of October, A. D., 1901, at the hour of 12 m., all and singular *the corporate property of the defendant, The Western North Carolina Railroad*, existing in the State of North Carolina, including *its corporate franchises, rights, privileges, immunities, easements and appurtenances of every kind appertaining*, belonging to, or in anywise connected

therewith, *or issuing out of and relating to the said The Western North Carolina Railroad*, together with all *of its property in the State of North Carolina*, and *including its road-bed and right of way, its real estate acquired and owned for railroad purposes, its stations, depots, grounds, its railway tracks, switches, sidings, bridges, fences, turn-tables, water tanks, viaducts, culverts, superstructures, passenger, freight and other houses, machine shops, buildings and fixtures—the said railroad extending from the town of Salisbury through Statesville, Newton, Hickory, Morganton, Marion, Asheville to Paint Rock in Madison county, and from Asheville westward by way of Waynesville to Murphy in Cherokee county*—reference being had for a further description of *said road and its property, rights and franchises to the charter of the said road and the amendments thereto enacted* from time to time by the General Assembly of North Carolina.

"This, the 4th day of Sept., 1901.

"D. R. JULIAN,
"*Sheriff of Rowan County.*"

It is to be observed that the sheriff in the above notice of sale says he "*will sell agreeably to the laws of the State, in this behalf provided*," the property and franchises levied on.

The following is the statute, under which he proposed to sell "*agreeably to the laws of the State:*"

Sec. 674 of the Code of North Carolina:

"The officers making sale shall by deed convey to the purchaser all the immunities and privileges which by law belong to the corporation, so far as relates to the right of demanding fare and toll; *and the officer shall immediately after such sale, deliver to the purchaser possession of all the corporate real property connected with the franchise, belonging to such corporations*, in whatever county the same may be situated, and the purchaser may thereupon demand and receive to his own use all the fare and toll which may accrue within the time limited by the term of his purchase, in the same manner and under the same regulations as such corporation was before authorized to demand and receive."

The sheriff in the execution was directed to satisfy the same, one in the sum of $15,000, and the other in the sum

of $5,000, by sale of property "as owned and held by it," the corporation, the Western North Carolina Railroad Company, "on the day when the said judgments were docketed in said county of Rowan."

The judgments were docketed in February, 1898, *years after the decree, and years after the registration of the deed of conveyance to the Southern Railway Company*, made and executed by order of the Circuit Court.

At the time of the docketing of the said judgments, the Western North Carolina Railroad Company owned no property, in so far, as appears here. Certainly it had no interest or estate in this property, the Western North Carolina Railroad, nor in the franchises purchased by the Southern Railway Company, in August, 1894.

It is insisted that the Supreme Court of North Carolina adjudicated in the case of *James* vs. *W. N. C. R. R. Co.*, that this property was liable for these judgments. 121 N. C. Rep., 528.

Nothing was adjudicated in that case except the matter, the question before the court, which was whether the old corporation *was dissolved under section 697 of the Code of North Carolina, by the sale and conveyance in accordance with the terms of the mortgage.*

The court decided, the old corporation was not dissolved. We say, this was the question before the court.

See Judge Simonton's opinion, page 30, Fed. Reporter, Vol. 89.

This was in September, 1897, in a case prosecuted against the Western North Carolina Railroad Company, by Mrs. James, executrix, for the death of James, dec'd, and intestate.

The case was tried in the county of Rowan, and there was a judgment for the defendant, which judgment was reversed by the Supreme Court, on appeal, at the September term of the court for the year 1897. It is alleged in the reply of the plaintiff, copy of which is set out in the bill on pages 26, 27

and 28, &c., that this sale, by orders and decrees of the Circuit Court, and in accordance with its decrees, *was only a pretended sale*, and that the Southern Railway Company *had no title to the railroad or its franchises.*

The only question, however, *decided* in the case *was*, as before said, whether there was a dissolution of the corporation.

Yet this court is asked to decree that the former decrees of the Circuit Court, entered in 1894, more than two *years before the deaths of James and Howard are nullities, and that the Southern Railway Company is not the owner of the property and franchise conveyed to it by the Circuit Court.* In *two decrees*, entered in *1894, in the Circuit Court*, the Southern Railway Company *was adjudicated to be the absolute owner of this property.*

In the next place there are no lien laws in North Carolina which make judgments in favor of parties against a railroad company liens upon property owned by other parties, whether corporations or not, purchased under foreclosure proceedings, *before the events out of which the judgments were obtained*, transpired.

When the causes of action originated, in 1896, November 18th, the Southern Railway Company had been in possession of this property and franchise as purchaser for more than two years.

Under the law providing for sale of the property levied on by the sheriff, he was compelled to deliver possession of the same to the purchaser, *immediately* after sale.

This would be *irreparable damage and to cast a cloud upon complainant's title.*

This relief asked is not in violation of Section 720, of the Revised Statutes.

It is to arrest the hand of this officer, in attempting to seize the property of complainant, illegally.

This officer is not the agent of these plaintiffs in the executions copied in the bill. He was directed what to do; and,

what not to do. If he could find property, belonging to the defendant in the execution, he was bound to seize it; but the property he proposed to seize, was not "*owned by the defendant.*" There was a deed, duly registered, showing that it was the property of the Southern Railway Company. It was, at least, a *presumption*, that it was so owned, and there was a way, pointed out by the law, by which this title could have been tested. His proposition to *seize it, and deliver it to the plaintiffs in the execution, or purchasers*, was not in pursuance of his agency for the plaintiffs. It was a trespass, threatened, and one the court will enjoin in protection of its purchaser. See Judge Simonton's opinion in 89 Fed. Rep., page 24. Also, opinion of Judge Boyd, in the record.

We might safely rest this case upon these two opinions.

In so far as the standing of these *parties in court, is concerned*, they are as much bound by the decrees of the circuit court, as the stockholders; or, the corporation. Whatever rights they have, come to them, through acts of the corporation. And, as the *corporation* is estopped, so are *these parties claiming by, under, and through it.*

CHARLES PRICE,
Solicitor for Complainants.

In fine; to restate the contention of the respondent, opposing the granting of the writ of certiorari, we submit:

There is no conflict of decision, between the Supreme Court of North Carolina, and any Court of the United States in this proceeding.

The foreclosure proceeding, in the Circuit Court, of the United States, under which, the Southern Railway Company, became the absolute owner of the Western North Carolina Railroad, and franchises of the corporation, was regular; the title to the railroad, and franchises, was duly vested in the *Southern Railway Company, by reason of this proceeding.*

This was the 22nd of August, 1894, the deed from the Master, bearing that date. Printed record, page 154.

This deed was made by order of the Court, and covered all the property, and franchises, involved in this suit, and WAS MORE THAN TWO YEARS, BEFORE, the alleged claims of James and Howard, ORIGINATED.

Then, at the time of the alleged negligent homicide, of James and Howard, in 1896, servants of the purchaser, and who, at no time, ever were the employés of the Western North Carolina Railroad Company, which had, in no way, consented to their being employed, (and which had no power to so consent,) by the said Southern Railway Company, the old Western North Carolina Railroad Company, corporation, *had no estate, of any kind, no interest of any kind,* in the Western North Carolina Railroad, or said franchises.

In the face of this fact, it is contended here, by petitioners, that, this property, these franchises, can be extended, by, and under final process, issued, upon a judgment, entered against *the Western North Carolina Railroad Company,* two years after the said sale, and, execution of the deed, by the Master, in satisfaction of the same.

In the first place, at the time of the judgments, the defendant, the Western North Carolina Railroad Company, HAD NO PROPERTY OF ANY KIND; not even, a FRANCHISE, except that, to be, and exist as a corporation. Memphis R. R. Co. *vs.* Coms., 112 U. S., 610.

It is maintained, that the defendant, was liable, as a lessor. The possession of the Southern Railway Company, was not that of lessee, but as PURCHASER AT A FORECLOSURE SALE.

How was the Western North Carolina Railroad Company any lessor?

It could not be, of this property. Because, the property, and franchises, were both in possession of the Southern Railway Co., as purchaser, under the decrees of the Circuit Court of the United States. See page 123, Record. Decree of confirmation of sale, Aug. 22, 1894.

For record of foreclosure suit, sale, etc., etc., see Record, page 90, etc.

From no possible standpoint, can the Southern Railway be anything, but *a purchaser of the property, and franchises.*

If the property is in possession of the Southern Railway Co., as such purchaser, being the absolute owner of the same, how can any suit, against the mortgagor, upon an alleged cause of action, having its *origin two years, and three months,* after the foreclosure sale, and date of the deed, affect the said purchaser's title?

In the Burnett case, 123 N. C. Rep., the *claim originated,* in 1894, he Burnett being a passenger, and injured, by reason of the negligence of the railroad company, *at that time.*

The deed of trust was made, in 1891, and the *foreclosure in 1897,* three years, *after the claim originated.*

By reason of section 1255, of the Code of North Carolina, this CLAIM, which arose in 1894, became a lien upon the property, superior to that of the mortgage, and, of course, was to be paid, before the purchaser, at the foreclosure sale, in 1897, could acquire the property, absolutely, and unencumbered.

In the case at Bar, the purchaser took the property, and franchises, unencumbered, because, two years, *before deaths of James and Howard.*

Here the sale was in 1894, and the deaths of James and Howard in 1896, November 18th, and as said, by the Circuit Court of Appeals, Judge Simonton, "It would be monstrous to affirm, that, in spite of this, the railroad property, and its franchises, remained in the Western North Carolina Railroad Company, subject to its debts, INCURRED AFTER THE SALE.

And so it would; it would be treating the sale, admitted to be regular and valid, as a nullity. It would be an utter failure to give effect to the decrees, orders, etc., of the Circuit Court of the United States.

The validity of the judgments of the State Court is not questioned, in this proceeding. It is the protection of the purchaser, in the use, and enjoyment, of property conveyed,

by the decree of the Court, solemnly entered, from seizure, by the sheriff, directed by process, in his hands, to sell property, *if such he could find*, in satisfaction of the same, *of the Western North Carolina Railroad Company*, owned by that Company, *at the date of the judgment, or, we may say, at date of origin of the claims*, of James and Howard, KILLED IN 1896, TWO YEARS AND THREE MONTHS, AFTER the Southern Railway Company became the sole owner of the said property, to wit, the railroad and franchises of the Western North Carolina Railroad Company, mortgagor.

If the killing of the said James and Howard had been before sale, and before the decree, and Master's deed, as in the Burnett case, then, the *property*, and *franchises*, would have been bound, under Section 1255 of the Code.

But, *then it must be established, and amount ascertained, against the person*, having the property, and operating it, *under the franchise*.

Otherwise, if twenty years elapse, after the property was conveyed, sold to the Southern Railway Company, this same property, *could be taken, and sold, under final process*, for a debt of the Western North Carolina Railroad Company—a judgment growing out of a disaster, 20 years, also, after the sale, and deed.

To accomplish the end, aimed at, in taking, in this way, the property of the Southern Railway Company, for the debt of the Western North Carolina Railroad Company, incurred, over two years, after the consummation of the title to the same, by the Southern, would be *to nullify the foreclosure proceedings of 1894*, in the Circuit Court of the United States. It would be in disregard of the principles laid down by Justice Shiras, in Farmers' Loan & Trust Co. *vs.* Lake Shore & St. Railroad, 177 U. S., 61.

CHARLES PRICE,
Solicitor for Respondents, Southern Railway Company and Central Trust Company of New York.

FEBRUARY 24, 1903.